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No. 466

In the Supreme Court of the United States

OCTOBER TERM, 1969

ST. HELENA PARISH SCHOOL BOARD, ET AL,
Petitioners,

v.

LAWRENCE HALL, ET AL.

On Application for Writ of Certiorari to the United States Court of Appeal, Fifth Circuit

[redacted] **OF THE STATE OF LOUISIANA AS AMICUS CURIAE**

JOHN J. McKEITHEN,
Governor of the State of Louisiana.

C. C. AYCOCK,
Lieutenant Governor of the State of Louisiana.

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

OF COUNSEL
VICTOR A. SACHSE and
FRANK P. SIMONEAUX of
BREAZEALE, SACHSE & WILSON,
701 Fidelity National Bank Building,
Baton Rouge, Louisiana.

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MOTION OF THE STATE OF LOUISIANA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Louisiana respectfully moves that its brief as amicus curiae be filed forthwith without formal leave of the Court or in the alternative moves the Court for formal leave of Court to file its brief as amicus curiae, on the following grounds:

1.

Pursuant to Section 4 of Rule 42 of the Rules of the Supreme Court of the United States, the State of Louisiana files its brief in this case as amicus curiae under the sponsorship of the Attorney General of the State of Louisiana as evidenced by his certificate appended hereto.

2.

Section 4 of Rule 42 dispenses with the necessity of obtaining consent of the parties for the filing of the brief of an amicus curiae when the amicus curiae is a state sponsored by its attorney general. As leave of Court seems to be required only when the consent of parties is required and refused, it appears that the State of Louisiana may file its brief as amicus curiae without obtaining formal leave of Court to do so.

3.

However, if the State of Louisiana has mistaken the meaning of the rules, leave to file the brief is requested and in support thereof Louisiana shows the following:

a. Louisiana requires school attendance by its children pursuant to R.S. 17:221 and provides free transportation pursuant to R.S. 17:158, and that while this present case involves only 42 of the 64 parishes of the State and 2 municipalities, all of the school districts of the State and the educational program of the State as a whole necessarily will be affected by the outcome of this case.

b. The case involves a principle vital to the State as a whole which is whether there can be lawfully imposed upon the people of some states as distinguished from others or upon all states a quota system designed by the court wholly on the basis of color or race for the composition of the student body and teaching faculty of public schools, and to effectuate such quota system to require extensive transportation of students by the

State or its agencies. These issues are applicable to the state as a whole more directly than to the several school boards and hence the State of Louisiana urges the Court to consider this brief amicus curiae supporting the application for writs of certiorari in this cause.

Respectfully submitted,

JOHN J. McKEITHEN,
Governor of the State of Louisiana

C. C. AYCOCK,
Lieutenant Governor of the State of Louisiana

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.
Sponsor

VICTOR A. SACHSE, Counsel

FRANK P. SIMONEAUX, Counsel

CERTIFICATE

I, Jack P. F. Gremillion, Attorney General of the State of Louisiana, sponsor the motion by the State of Louisiana to file a brief amicus curiae and such brief in support of the application for writ of certiorari in this matter, which I do pursuant to Rule 42 of the Supreme Court of the United States.

Baton Rouge, Louisiana, this 8th day of October, 1969.

JACK P. F. GREMILLION
Attorney General,
State of Louisiana.

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BRIEF OF THE STATE OF LOUISIANA AS AMICUS CURIAE

* * *

May it Please the Court:

INTEREST OF THE STATE OF LOUISIANA AS AMICUS CURIAE

The interest of the State of Louisiana as amicus curiae is set forth in paragraph three of its Motion For Leave To File Brief As Amicus Curiae.

ARGUMENT

The Fifth Circuit in the current case seems to say in effect that to satisfy the decisions of this Court it must require the school boards of the State of Louisiana to establish a quota system based wholly upon considerations of race in the composition of student body and faculty. This Court found objectionable and unconstitutional a dual system of public schools based upon

race and we think it should hold such a predicate objectionable and unconstitutional here.

The State of Louisiana by reason of the Constitution, particularly Article IV, Section 3, is on an equal footing with the other states, with the right to enjoy the same measure of local or self-government as the other states in this Union. The present position of the United States Court of Appeal for the Fifth Circuit seems to be in flagrant contradiction of this fundamental right as it treats the State of Louisiana as once again as something less than a full member of the Union as though it were again within a period of reconstruction.

In *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294, 300, 301, 73 S. Ct. 753, 756, this Court said:

> "[T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units *to achieve a system of determining admission to the public schools on a nonracial basis*, and revision of local laws and regulations which may be necessary in solving the foregoing problems." (Underscoring ours)

In *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430, 432, 88 S. Ct. 1689, 1691, Justice Brennan related the quoted statement from *Brown* to the question as to whether "adoption of a 'freedom of choice' plan which allows a pupil to

choose his own school constitutes adequate compliance with the Board's responsibility *** ".

The Court found objectionable and unconstitutional a dual system of public schools based upon race. We refer to *Downs v. Board of Education*, 336 F. 2d 988 (1964), Tenth Circuit. The complaint was de facto segregation in Kansas City schools. The Court noted that the school system operates on what is known as the neighborhood school policy. That Court did not read into the *Brown* decision as much as Justice Brennan did in the *Green* case. The Court said:

> "The neighborhood school system and other school systems, by which admission to the school is determined upon the basis of similar criteria such as residence and aptitude, are in use in many parts of the country. They have been successfully challenged on constitutional grounds where operated in such a way as to discriminate against students because of their race or color." (Page 995)

The Circuit Court further noted:

> "There is, to be sure, a racial imbalance in the public schools of Kansas City ***."

And the Court gave the figures. The Court further said:

> "*** Of course, we agree with the appellants that the school authorities cannot, under applicable constitutional standards heretofore discussed, use such a change in boundary lines or the neighborhood school system as a guise for the purpose of perpetuating racial segregation. The trouble is that there is no evidence to show that the boundary line was changed for that purpose.*** " (Page 996)

The Court further said:

> "Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them. *** " (Page 998)
>
> "Moreover, the question was conclusively answered in Bell v. School City of Gary, Indiana, 7 Cir., 324 F. 2d 209, 213, cert. denied, 377 U. S. 924, 84 S. Ct. 1223, 12 L. Ed. 216, where the court held that '*** "There is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils." ' " (Page 998)

In *Tina Deal et al v. The Cincinnati Board of Education*, 369 F.2d. 55, 58; certiorari denied 389 U. S. 847, 88 S. Ct. 39, still another Circuit Court of the United States dealt with this issue. The Ohio school system was based on the so-called neighborhood plan. The Court said:

> "Appellants contend that the maintenance of a public school system in which racial imbalance

> exists is a violation of their constitutional right to the equal protection of the law. They assert that because the Negro student population is not spread uniformly throughout the Cincinnati school system, without showing a deliberate discrimination or even racial classification, there is a duty of constitutional dimensions imposed on the school officials to eliminate the imbalance."

That court thought that:

> "The essence of the *Brown* decision was that the Fourteenth Amendment does not allow the state to classify its citizens differently solely because of their race."

While we recognize that the abandonment of a dual school system based on color is intended to result in a school system not based on color or race, it seems to us as it seemed to that Court that a quota system based on race violates the Constitution of the United States.

John Kaplan, then Associate Professor of Law, Stanford University, writing on this general subject, discussed percentage integration as defined in Bell v. School City of Gary, Indiana, 324 F2d 209, cert. denied, 377 U.S. 924. The plaintiffs there insisted that the variation be neither more than one third above nor more than one third below the percentage of Negroes in the community at large. He considered also the Urban League definition that a school must be considered a Negro school if 60 percent of the children are of that race. He said, "Although each of the definitions may in some pragmatic way have a value, it is hard to imagine that a court might say that one or the other was incorporated into the United States Constitution under the

general purposes and framework of the fourteenth amendment." Vol. 58, Northwestern University Law Review, p. 157, 181.

Affirmative action required by a state might well include the designation of areas which a public school will primarily serve, and the drawing of lines encompassing such areas in such a manner as to include residents of both races to the extent that the school can reasonably serve such an area. Affirmative action might well also include the assignment of teachers to schools without regard to race or color with the *result* that faculty and student body will include Americans of both colors. But, action which means that a fixed proportion of children of the two races and a fixed proportion of teachers of the two races must make up the composition of the various public schools will force continuing concentration of thought upon the matter of race and color and will inject into American life a racial quota system which can be expected to pervade our whole economic world.

In the *Deal* case the court said:

> "In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situa-

> tion is far removed from *Brown*, where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, prejudice. We read *Brown* as prohibiting only enforced segregation."

In Louisiana this choice may be exercised without moving into the neighborhood of another school. If *Brown* is read as not only prohibiting enforcing segregation but as commanding affirmative steps to produce integration, the Court is urged to refrain from permitting the subordinate federal courts to force children to attend a school far from their own neighborhoods and against the wishes of their parents. For this, it seems to us, means the death of not just freedom-of-choice, which this court has said was only a means to an end, but the death of freedom itself. If the principle of quota based on race and color is not rejected as to the schools, we must expect that all public and private works hereafter must be constructed by corps of craftsmen and laborers chosen on a quota system based upon color. So also for every phase of the 65 million or more people employed in the affairs of this nation: its police force; its army; its navy; until everyone in this country is forced to think of color first and to be required to engage in pursuits whether he wants to or not because the court thinks that is the way to achieve a satisfactory racial balance. Once we engage upon a quota system based upon color, we must determine the basis for

determining the quota; whether by school district; whether by state; whether by nation, and when this is carried forward into our other activities involving the greater portion of the adult portion of our country the complications are immense.

Our country has gone through a long effort to rid itself of a quota system based on national origin as concerns immigration. The Act of May 26, 1924 (c. 190, 43 Stat. 153) was bitterly resented by vast numbers of our people and the Act of October 3, 1965 [1] (§ 1, 79 Stat. 911, Pub. L. 89-236) was largely aimed at ameliorating the ill will that an immigration law based upon quota related to the national origin of our population of earlier years engendered.

As concerns schools, a determination to base their composition upon race and color will necessarily involve transportation of students from their home neighborhoods to other neighborhoods.

The transportation of children from the neighborhood of their homes to distant schools when other sufficient schools are nearby and only for the purpose of achieving a racial balance in the schools is objectionable to many people of both races throughout our nation. It is objectionable to many parents who decry the excessive exposure of their children to the hazards of traffic and who decry the longer absence from their

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[1] "(a) No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place or residence, except as specifically provided in sections 1101(a) (27), 1151(b), and 1153 of this title:"

homes necessary to accomplish this excessive transportation. It is objectionable to boards of education because of the extra expenses imposed upon them in the operation of motor vehicles and, in some instances, extra investment in motor vehicles. We do not believe that this point has been passed upon by this Court but it has received attention by other courts.

We refer once more to *Deal* where the court said:

> "We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose.
>
> "The bussing of pupils away from the neighborhoods of their residences may create many special problems for boards of education. These include the providing of adequate transportation and proper facilities and personnel for the supervision, education and well being of *all* pupils. All of this must be accomplished within the Board's budget."

We ask this Court to reject a quota system based upon race. In another area of the law, Dean Rusk, when Secretary of State, said:

> "As long as our immigration law classifies persons according to national and ancestral origins, we cannot convince our critics that we judge each other on the basis of ability, industry, intelligence, integrity, and such other factors as determine a man's value to our society. On the contrary,

the continuance of the national origins system suggest that we think less well of those citizens of the United States who are descended from certain ethnic origins than we do of others, and—so the logic goes—for that reason we are reluctant to receive more from certain countries." [2]

From Senate Report No. 748, Conference Report No. 1101, September 29, 1965:

"The bill H.R. 2580, as amended, does not embody a comprehensive revision of the Immigration and Nationality Act, *but has as its primary objective the abolishment of the national origins quota system for the allocation of immigrant visas . . .*"

* * *

"The witnesses included congressional sponsors of the proposed legislation, Cabinet officers, Government officials, representatives of religious, patriotic, nationality, veterans, labor, and other nongovernmental organizations as well as from individual members of the public. The positions of both the proponents and opponents of change in the existing law were presented to the subcommittee in depth.

"The committee, after consideration of all the information before it and after its detailed study of the recommendations of the President and the strong representations made by the concerned executive departments, has concluded that the national origins provisions of the Immigration

[2] SubCommittee on Immigration and Naturalization of the Committee on the Judiciary, U. S. Senate, Feb. 24, 1965 in the course of hearings on 5.500, an administration sponsored proposal to amend the U.S. immigration laws. *Congressional Digest*, May, 1965, p. 142.

and Nationality Act should be removed from the law and a highly selective system for the admission of immigrants as contained in the bill H.R. 2580, as amended, be adopted."

Let it be said that following a long pattern of the history of our nation racial distinctions were made. Let it be acknowledged that some of the states of this great Union continued to cling to this pattern under the approval of this Court (*Plessy v. Ferguson*, 163 U.S. 537) until the Brown decision. Let it be said that the decision was not welcomed in all quarters. It must yet be said that Louisiana has conformed to the direction of the United States Court for the Fifth Circuit in Jefferson. *United States of America v. Jefferson County Board of Education, et al*, 372 F. 2d. 836, corrected and affirmed en banc 380 F. 2d. 385, cert. den. 389 U.S. 840. That many Negro parents have not chosen to send their children to schools formerly attended only by white children, that no white parents have chosen to send their children to schools formerly attended only by Negro children does not make these schools either black or white. In obedience to the dictates of this Court no such schools exist in Louisiana by law. If then, their composition does not reflect the proportionate population of nation or of state, or of school district, this is the result of freedom in our great nation. Louisiana, for itself and for all Americans asks this Court not to bid freedom farewell.

For which reasons, the State of Louisiana respectfully supports the application for writs.

Respectfully submitted,

JOHN J. McKEITHEN,
Governor of the State of Louisiana

C. C. AYCOCK,
Lieutenant Governor of the State of Louisiana

by
JACK P. F. GREMILLION,
Attorney General
State of Louisiana.
Sponsor.

VICTOR A. SACHSE, Counsel

FRANK P. SIMONEAUX, Counsel

PROOF OF SERVICE BY MEMBER OF SUPREME COURT BAR PURSUANT TO RULE 33(3)

I, Jack P. F. Gremillion, Attorney General of the State of Louisiana, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of October, 1969, I served copies of the foregoing Motion of the State of Louisiana To File Brief as Amicus Curiae and The Brief Amicus Curiae on the several parties thereto, as follows:

1. On the United States by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C. 20530; to Jerris Leonard, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; to Merle W. Loper, Joseph Ray Terry, Jr. and Hugh W. Fleischer, Department of Justice, Washington, D. C. 20530; and to Patrick Hardin, Department of Justice, New Orleans, Louisiana.

2. On the Various Named Plaintiffs, by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to Collins, Douglas & Elie, 344 Camp Street, New Orleans, Louisiana; Richard B. Sobol, George M. Strickler, Jr., Robert P. Roberts, 606 Common Street, New Orleans, Louisiana; Jack Greenberg, Norman C. Amaker, William Bennett Turner, Norman Chachkin, 10 Columbus Circle, New York, New York 10019; and A. P. Tureaud, 1821 Orleans Avenue, New Orleans, Louisiana.

3. On the various named schools boards, petitioners herein, by mailing copies in duly addressed envel-

opes, with first class postage prepaid, to their attorney of record, John F. Ward, Esq., 206 Louisiana Avenue, Baton Rouge, Louisiana.

JACK P. F. GREMILLION,
Attorney General of the State
of Louisiana,
State Capitol Building,
Baton Rouge, Louisiana.